

UNITED STATES DISTRICT COURT
Northern District of California

KAMAL AZARI, et al.,

No. C 13-1650 MEJ

Plaintiffs,

**ORDER FOR CLERK OF COURT TO
REASSIGN CASE**

v.

SOLANO COUNTY TREASURER, et al.,

REPORT & RECOMMENDATION

Defendants.

INTRODUCTION

On April 11, 2013, Plaintiffs Kamal and Pari Azari filed the above-captioned case, seeking injunctive relief against Solano County related to delinquent tax payments. Dkt. No. 1. However, Plaintiffs made no further filings since that date, and there is no indication that Defendants have been served. Accordingly, on July 8, 2013, the Court vacated the July 11 Case Management Conference and ordered Plaintiffs to file a status report by July 25, 2013. Dkt. No. 7. As Plaintiffs failed to respond, the Court ordered Plaintiff to show cause by August 29, 2013, why this case should not be dismissed for failure to prosecute and failure to comply with court deadlines. Dkt. No. 8. The Court provided notice to Plaintiff that it may dismiss the case if Plaintiffs failed to respond by the deadline. As of the date of this Order, Plaintiffs have failed to respond. Based on this procedural history, the Court finds it appropriate to dismiss this case pursuant to Federal Rule of Civil Procedure 41(b).

LEGAL STANDARD

Under Rule 41(b), “the district court may dismiss an action for failure to comply with any order of the court.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992); *see also Oliva v. Sullivan*, 958 F.2d 272, 273-74 (9th Cir. 1992) (district court may dismiss sua sponte for failure to meet court deadline). “[T]he district court must weigh the following factors in determining whether a

1 Rule 41(b) dismissal is warranted: ‘(1) the public’s interest in expeditious resolution of litigation; (2)
2 the court’s need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy
3 favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.’”
4 *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1084 (9th Cir. 2010) (quoting *Henderson v. Duncan*, 779 F.2d
5 1421, 1423 (9th Cir. 1986)). “These factors are ‘not a series of conditions precedent before the judge
6 can do anything,’ but a ‘way for a district judge to think about what to do.’” *In re*
7 *Phenylpropanolamine (PPA) Products Liab. Litig.* (“*In re PPA*”), 460 F.3d 1217, 1226 (9th Cir.
8 2006) (quoting *Valley Eng’rs Inc. v. Elec. Eng’g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998)).
9 Dismissal is appropriate “where at least four factors support dismissal . . . or where at least three
10 factors ‘strongly’ support dismissal.” *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir.
11 1998).

12 ANALYSIS

13 Here, the Court finds that the *Henderson* factors support dismissal. First, “the public’s
14 interest in expeditious resolution of litigation always favors dismissal.” *Yourish v. Cal. Amplifier*,
15 191 F.3d 983, 990 (9th Cir. 1999). Plaintiff has delayed adjudication of the claims in this case by
16 failing to file anything after their initial Complaint.

17 Second, the Court’s need to manage its docket also weighs in favor of dismissal.
18 Non-compliance with procedural rules and the Court’s orders wastes “valuable time that [the Court]
19 could have devoted to other . . . criminal and civil cases on its docket.” *Ferdik*, 963 F.2d at 1261.

20 As for the third *Henderson* factor, the mere pendency of a lawsuit cannot constitute sufficient
21 prejudice to require dismissal. *Yourish*, 191 F.3d at 991. However, “prejudice . . . may . . . consist of
22 costs or burdens of litigation.” *In re PPA*, 460 F.3d at 1228. Moreover, “a presumption of prejudice
23 arises from a plaintiff’s unexplained failure to prosecute.” *Laurino v. Syringa Gen. Hosp.*, 279 F.3d
24 750, 753 (9th Cir. 2002). A plaintiff has the burden of demonstrating a non-frivolous reason for
25 failing to meet a court deadline. *Id.*; see also *Yourish*, 191 F.3d at 991. Here, Plaintiff has failed to
26 respond to the Court’s Order to Show Cause and has not otherwise offered an explanation for the
27 failure to prosecute this case. Therefore, the Court concludes that the third *Henderson* factor also
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1 supports dismissal.

2 The fourth *Henderson* factor normally weighs strongly against dismissal. *See, e.g.,*
3 *Hernandez*, 138 F.3d at 399. “At the same time, a case that is stalled or unreasonably delayed by a
4 party’s failure to comply with deadlines . . . cannot move forward toward resolution on the merits.”
5 *In re PPA*, 460 F.3d at 1228. The Ninth Circuit has “recognized that this factor ‘lends little support’
6 to a party whose responsibility it is to move a case toward disposition on the merits but whose
7 conduct impedes progress in that direction.” *Id.* (quoting *In re Exxon Valdez*, 102 F.3d 429, 433 (9th
8 Cir. 1996)). Thus, if the fourth *Henderson* factor weighs against dismissal here, it does so very
9 weakly.

10 Finally, the Court has already attempted less drastic sanctions, without success, and therefore
11 determines that trying them again would be inadequate or inappropriate. “Though there are a wide
12 variety of sanctions short of dismissal available, the district court need not exhaust them all before
13 finally dismissing a case.” *Nevijel v. N. Coast Life Ins. Co.*, 651 F.2d 671, 674 (9th Cir. 1981). Here,
14 the Court already attempted the lesser sanction of issuing an Order to Show Cause and giving
15 Plaintiffs an opportunity to explain the failure to prosecute this case. As Plaintiffs failed to respond,
16 ordering them to do so again is likely to be futile. *See, e.g., Gleason v. World Sav. Bank, FSB*, 2013
17 WL 3927799, at *2 (N.D. Cal. July 26, 2013) (finding dismissal under Rule 41(b) appropriate where
18 the court previously attempted the lesser sanction of issuing an Order to Show Cause and giving the
19 plaintiff an additional opportunity to re-plead). Further, the Order to Show Cause warned Plaintiffs
20 of the risk of dismissal; thus Plaintiffs cannot maintain that the Court has failed in its “obligation to
21 warn the plaintiff that dismissal is imminent.” *Oliva*, 958 F.2d at 274. Thus, the Court finds that the
22 fifth factor also weighs in favor of dismissal.

23 CONCLUSION

24 Based on the analysis above, the Court finds that at least four of the five *Henderson* factors
25 weigh in favor of dismissal. Plaintiffs have failed to file a status report or respond to an order to
26 show cause. Thus, Plaintiffs has failed to prosecute this case and dismissal is appropriate. However,
27 a less drastic alternative is to dismiss without prejudice. *See Ferdik*, 963 F.2d at 1262. Dismissal
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1 will minimize prejudice to Defendants, but dismissing the case without prejudice will preserve
2 Plaintiffs' ability to seek relief. Thus, "[i]n an abundance—perhaps overabundance—of caution," the
3 Court finds that dismissal without prejudice is appropriate. *Faulkner v. ADT Security Servs., Inc.*,
4 2013 WL 174368, at *4 (9th Cir. Jan. 17, 2013) (remanding to the district court in order to consider
5 whether dismissal should have been without prejudice).

6 Accordingly, because Plaintiffs have yet to consent to the undersigned's jurisdiction, the
7 Court hereby ORDERS the Clerk of Court to reassign this case to a district court judge. The
8 undersigned RECOMMENDS that the newly-assigned judge DISMISS this case WITHOUT
9 PREJUDICE for failure to prosecute and failure to comply with the Court's deadlines and orders.

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11 Pursuant to Federal Rule of Civil Procedure 72, any party may serve and file objections to this
12 Report and Recommendation within 14 days after being served.

13 **IT IS SO ORDERED AND RECOMMENDED.**

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15 Dated: September 6, 2013

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17 Maria-Elena James
18 United States Magistrate Judge
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